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In The

Supreme Court of the United States

October Term, 1923.

No. 15
(29,131).

GEORGE CARROLL, and
JOHN KIRO,
Plaintiffs in Error,

v.

THE UNITED STATES,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR ON REARGUMENT.

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PRELIMINARY STATEMENT.

(The references by number contained in this brief refer to the page of the printed record unless the context indicates the contrary.)

Our position is unchanged from that taken in our former brief and upon the prior oral argument. Since then, however, several recent cases of the state courts having more or less application to the instant cause have become available. We deem it advisable to call these to the attention of the court and also to expand somewhat several branches of the previous brief and argument.

ARGUMENT.

I.

The Facts Shown at the Trial For the First Time Cannot Aid the Government as to the Reasonableness of the Search.

The most important question in the instant cause is whether the search, seizure and subsequent arrest of defendants was legal. Naturally the facts surrounding the search are of utmost significance. Defendants twice sought to obtain a return of the property seized and suppression of the evidence because of the illegal manner of the taking.

First, the facts were set before the United States Commissioner who denied the request. On this occasion one of the arresting prohibition officers testified that the officers met defendants traveling in an automobile on the public highway, stopped them, searched the car and found the liquor. The officer further testified that he and his comrades had no warrant and were not on the lookout for defendants and "had no reason to believe that the respondents were transporting liquor" (1-2).

Second, defendants filed separate sworn petitions addressed to the trial court setting up the facts in more detail (3-6). It there appeared that the officers passed defendants and then turned about, overtook and stopped them. The officers then searched the defendants and the

car and at first found nothing. They were about to release defendants when one of the officers struck something hard in the back cushion of the car, tore the cushion cover and found liquor concealed therein.

There never has been any denial on the part of the government concerning the veracity of the petitions. The government filed no counter-affidavits and indeed acquiesced in the facts as set forth in the petitions. There was absolutely no showing or claim of any grounds of suspicion on the part of the officers prior to the discovery, that defendants were violating the law. There was no suggestion that there was anything in the appearance, manner, former conduct or reputation which led the officers to suspect defendants. The petitions were heard by the court in advance of the trial and denied (6).

We respectfully submit that upon the facts that were virtually agreed upon, the search was unreasonable. Such a search cannot be justified unless the officers had visitorial power to stop and search *all* automobiles traveling on the public highway. The government expressly disclaims any such visitorial power but now contends the search was reasonable because the officers knew defendants were selling liquor. (See pages two, seven and ten of the government's original brief). This claimed fact was not shown at any time and nothing whatever of that nature was claimed until the trial. Upon the trial two of the officers claimed that three months prior to the arrest defendants and a third man had agreed to sell one of them a quantity of liquor but later came back and said they were unable to obtain it (8, 11). Defendants objected to this testimony and took exception to its admission (8) and assigned error thereon (16, 17).

We wish here to renew and urge most strongly upon the court that the matter of reasonable search must be determined according to the facts as they appear upon the preliminary motion to suppress the evidence. This court held in *Adams v. United States, 192 U. S., 585; 24*

Sup. Ct., 372, that the accused cannot raise the point of unreasonable search at the trial, because of the collateral issues which would be involved. This court has always insisted that the application must be timely, although in the case of *Gouled v. United States, 255 U. S., 298; 41 Sup. Ct., 261,* failure to make application before trial was excused when the seizure was made by stealth and the accused first knew of it when the evidence was offered.

In the instant cause the government knew the facts fully as well on the occasions of the preliminary hearing and the motion before the trial court, as it did at the trial. Officer Scully who at the preliminary hearing swore that the officers had no reason to suspect appellants (1-2), was one of the witnesses who testified to the attempted purchase of liquor on a prior occasion (8).

The admission of the evidence concerning the prior attempted purchase of liquor by one of the officers had absolutely no relevancy to the guilt of the defendants on the charge then being tried. Even if it were relevant, it was clearly incapable of assisting the government's claim that the search was reasonable.

Under the "timely application" rule of this court, appellants could not contend for the first time at the trial that the search was unreasonable and the discovered evidence inadmissible. We apprehend that this rule is reciprocal and that the government cannot be aided at the trial by evidence tending to show the search reasonable. The whole question of reasonableness or unreasonableness must be determined upon the showing made upon the hearing of the petitions.

Any other ruling would absolutely shatter all the plausibility of the "timely application" rule of this court. This rule is maintained in order that collateral questions at the trial should be avoided. Can the accused be required to avoid collateral issues at the trial and the government be permitted to raise the same collateral

issues? Unless this court is prepared to expressly overrule the case of *Adams v. United States*, we believe it cannot consider the government's showing at the trial upon the question of reasonableness.

In addition, the defendants were unfairly surprised at the trial. It must be observed that they made no defense upon the merits and rested solely upon the proposition that the evidence was obtained through unconstitutional search. Naturally they felt that the questions concerning the reasonable search had been determined before the trial was begun. The government showed no indication before trial of insisting on other facts on the question of reasonableness and the testimony of officer Scully before the commissioner expressly acquiesced in the facts as set forth in the petition. Consequently the appellants did not come to the trial prepared to show facts in denial or explanation of the testimony relative to the prior attempted purchase of liquor. It may be suggested that the testimony of Kruska, the third person said to have been present on the prior occasion (11), might have had considerable force. Even if the government's evidence were not collateral to the issues at the trial it is a clear instance of unfair surprise to the appellants. Defendants were distinctly misled by the government's former position and were justified in the belief that the facts regarding reasonableness were not to be questioned at the trial.

In passing we wish to remind the court that the immediate circumstances of the search as set forth in the petition were not questioned, but were reiterated by the officers at the trial. There is no difference in the stories except that there was testimony at the trial of the attempted purchase of liquor, two and a half months prior to the search, and a trifling incident concerning the officers having seen defendants a week thereafter on the highway with the car which was searched.

We believe that even if the facts shown for the first time at the trial are considered, the arrest and search will ap-

pear unreasonable. However, these facts should not be considered and without them the search is so clearly unreasonable that the government concedes this in its brief.

II.

The Arrest Was Illegal.

The arrest in this case was without a warrant (1); no warrant was issued until the day after defendants were arrested (1). That a warrant issued after an illegal arrest cannot make the arrest lawful requires no argument.

When an arrest is made without a warrant, the burden is on the officers to show legality of the arrest. At common law a distinction was made between arrest without warrant in the case of felony and in the case of misdemeanor. While an officer might arrest one upon reasonable grounds of suspicion that he had committed a felony, the officer could not arrest for a misdemeanor unless the offense was committed in his presence.

The above is the common law rule.

Kurtz v. Moffit, 115 U. S., 487.
John Bad Elk v. United States, 177 U. S., 529.
Drennan v. People, 10 Mich., 169, 187.
Sarah Way's Case, 41 Mich., 299.
State v. Lutz, 85 W. Va., 330;101 S. E., 434.
State v. Wills, 91 W. Va., 659; 114 S. E., 261.

The three last mentioned cases maintain that the misdemeanor must not only be committed in the officer's presence but must also amount to a breach of the peace in order to justify an arrest without a warrant.

No federal statute sets forth the circumstances under which an officer may arrest without a warrant. Under Section 28 of the National Prohibition Act, 41 Stat., 316,

taken in conjunction with Section 788 of the Revised Statutes, a prohibition agent would have the same authority to arrest without a warrant, as a state officer.

This offense was committed in the state of Michigan; consequently we look to the law of that state. There appears to be no statute in Michigan upon the subject. *Sarah Way's Case, 41 Mich., 299,* however, adopts the common law rule outlined *supra.*

In the instant cause we can dismiss with a word the branch of the rule referring to felonies. The offense here was not a felony. Moreover there were no grounds for belief that a felony had been committed. Indeed officer Scully's testimony is to the effect that there was no reason to believe that *any* offense had been committed (1, 8). Cronenwett's testimony is to like effect (13).

In the instant cause the facts show that neither of the elements necessary for an arrest without a warrant for a misdemeanor exist in the instant cause. In misdemeanors, the offense must amount to a breach of the peace and also must be committed in the presence of the arresting officer. It is scarcely open to question that the offense in the case at bar was not a breach of the peace. This fact alone makes the arrest here under consideration illegal according to the Michigan rule.

Moreover the offense was not in legal contemplation committed in the presence of an officer. In the government's original brief it is contended that as the possession and transportation was going on, at the time of the arrest, it was committed in the presence of the officers. Cases are cited in the course of the argument but not one of them sustained the contention.

The true rule, as stated in our former brief (pages 12-15) is that unless the offense is discoverable without a search, it is not in legal contemplation committed in the presence of the officer.

In addition to the cases cited upon our former brief, the very recent case of *State v. Pluth (Minn.)*, *195 N. W., 789*, is directly in point.

The facts in that case are almost identical with those in the instant cause. Defendant, driving toward Duluth with two companions, and the officers driving out of Duluth met on the highway. As the road was bad, defendant turned to side of the road to permit the officers' car to pass. One of the officers recognized defendant and they also stopped. Some conversation took place and one of the officers rushed up, opened the curtains and searched the car and discovered liquor. There was a statute, declarative of the common law, that an officer might arrest without a warrant for an offense "committed or attempted in his presence." The court said:

> "The crime charged against defendant is punishable only by a fine and imprisonment in the county jail, and therefore is not a felony under our statute. See Section 8466, G. S. 1913. Consequently the officers could not lawfully arrest him therefor without a warrant, unless the offense was committed or attempted in their presence. It cannot be said that a criminal offense is committed in the presence of an officer unless the acts constituting the offense become known to him at the time they are committed through his sense of sight or through other senses. Although a person may actually be committing a criminal offense, it is not committed in the presence of an officer within the meaning of the statute, if the officer does not know it. And where the officer could not observe nor become cognizant of the act constituting the offense by the use of his senses it could not be committed in his presence so as to authorize an arrest without a warrant."

III.

The Search and Seizure Were in Violation of the Constitutional rights of Plaintiffs in Error.

The Fourth Amendment to the Constitution is broader than the maxim, "A man's home is his castle." This proposition was distinctly recognized by this court as early as *Ex parte Jackson, 96 U. S., 727,* where it was held that opening of a sealed letter in the mails violated the Fourth Amendment.

It will be noted that not only houses but persons, effects and papers are guaranteed protection. The government or its agencies cannot violate the security or privacy of any of these four objects. They are separated in the text of the Amendment only by commas and unreasonable searches and seizure of each are equally forbidden.

There are two possible ways that a search can be reasonable without a warrant; first, after legal arrest, the person may be searched; second, there are a few examples of a general visitorial power to search.

The search and seizure in the instant cause cannot be justified as a search after legal arrest for two reasons. In the first place the search preceeded the arrest (2, 4, 5, 13, 9). It requires no extended discussion to show that an arrest cannot be grounds for a search which preceded the arrest. In the instant cause the result of the illegal search was the grounds upon which the arrest was made. Two well considered cases have shown that such an arrest will not justify the search.

> *People v. Margelis, 217 Mich., 423; 186 N. W., 488.*
> *State v. Pluth (Minn., 1923), 195 N. W., 789.*

But even if the arrest had preceded the search, the latter would have been unreasonable. A search after an

illegal arrest is unreasonable. This proposition is fully maintained by the many cases cited on pages 17-25 of our original brief, and by the recent case of *State v. Pluth (Minn., 1923), 195 N. W., 789.*

There are a few examples of visitorial power of officials to search. They are exceptions and are reasonable only because of the peculiar circumstances under which they are permitted. General executive or judicial warrants to search are void at common law as seen by the *Wilkes cases,* and are expressly forbidden by the constitution. General warrants of authority to search granted by the legislature would be even worse because their nature would necessarily be more sweeping than executive or judicial warrants and hence more capable of abuse on the part of numerous hordes of petty officials.

In two instances officers are granted visitorial powers. Customs officers are granted power by Congress to search persons and property for dutiable goods (R. S., 3059). This is a devise necessary for the collection of customs and may be said to be a right which the government exercises over individuals in exchange for the privilege of entering the territory of the United States. Moreover it is not readily capable of abuse for the searches are ordinarily made only at points of entry and under the supervision of responsible superiors. It is true also that by Section 3061 of the Revised Statutes persons and vehicles may be searched by customs officers outside the customs house. This is for the obvious purpose of reaching dutiable goods which have escaped the payment of duty by evasion. No case has determined its constitutionality. It is extremely doubtful if evidence thus obtained by customs officers could be lawfully used in a criminal prosecution. Moreover customs officers were limited in number. The power was never given to internal revenue officers, who had however, a right to inspect distillers, etc., without a warrant. (R. S., 3177). Federal prohibition agents were not granted the right of customs officers but of internal revenue officers only (41 Stat., 316). This indi-

cates a clear legislative intent to deny to prohibition agents, the right without a warrant to search persons and vehicles traveling on the highway.

Nor have prohibition agents the right to search all vehicles in order to discover violations under the provisions of Section 26 of the National Prohibition Law which says that when any officer "shall discover" a person in the act of transporting liquor, he shall seize the liquor and arrest the person in charge.

We have discussed at some length in our former brief, pages 26-27, the meaning of that language. Our position is sustained by a New York case under an identical statute. *State v. One Hudson Automobile, 190 N. Y. Supp., 481, 482, 483.* While the opinion is of little weight as authority we quote it because of the intrinsic worth of the reasoning.

> "It is the manifest intent of these provisions that, when an officer actually finds or discovers the direct proof of illegal possession or transportation, he may seize, without warrant, except where the place is a private dwelling; but it is not entirely clear that the Legislature intended to authorize a search, as the means of discovering or finding, without warrant and without process of any kind.
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> * * *
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> In other words, if an officer actually sees or has before him direct tangible proof that liquors are being transported unlawfully in a given vehicle, he may seize that vehicle and the contents thereof and arrest the person in charge. In such a case he finds or discovers within the meaning of the statute. But if he merely suspects or believes, or without suspicion or belief seizes and searches for the purpose of obtaining knowledge, his act is unjustified and unwarranted by the statute; for if the statute should be otherwise construed it would be, in my opinion, unconstitutional and void."

Reaching the same conclusion is an able article entitled: "A New Discovery," by George L. Hunt, 9 A. B. A. Jo., 321.

Given any other construction than we do to the word "discover," Section 26 must be unconstitutional.

A fortiori no search can be justified on common law principles. The well considered cases indicates that an officer has no right to search a vehicle traveling on the public highway.

Butler v. State, 129 Miss., 778; 93 So., 3.
Taylor v. State, 129 Miss., 815; 93 So., 355
State v Pluth (Minn., 1923), 195 N. W., 789.
Hoyer v. State (Wis.), 193 N. W., 976.
State v. One Hudson Automobile, 190 N. Y. Supp., 481.
State v. Gibbons, 118 Wash., 171; 203 Pac., 391.

United States v. Bateman (1922, S. D. Cal.), 278 Fed., 231, is quoted at length in the government's brief and is evidently much relied upon as establishing a general visitorial power over automobiles. We submit that the reasoning in that case is fallacious because it goes upon the ground that the 18th Amendment must be enforced at all costs. The 18th Amendment must be enforced but the constitutional guaranties of the first ten amendments must be observed in that enforcement. The mere fact that general searches of vehicles may help to enforce the 18th Amendment does not make those searches reasonable.

Conceivably it might be permissible for an officer to search a vehicle before an arrest in cases where the arrest of the occupants might be justified without a knowledge of the facts learned through the search. This would be placing the cart before the horse, however, and we urge that this court disapprove of such a practice. If the officer clearly knows facts sufficient to justify an arrest, he should make the arrest first and the search afterward.

This procedure would preclude such "fishing expeditions" as we have in the instant cause. It is indeed a fair question to ask in the instant cause, "if the officers had reasonable grounds for the search, why did they not arrest respondents first and search afterwards?"

On the showing made before the trial there was no grounds prior to the search at all for the belief on the part of the officers that appellants were committing an offense. Upon these facts, the search was made upon a mere venture. Is a search upon mere venture reasonable? The very purpose of the Fourth Amendment was to prohibit capricious examinations on the part of petty officers.

Searches of vehicles on the highway will if promiscuously permitted lead to great abuses. Innocent persons will be stopped by highwaymen simulating officers. The search will extend to everyone. The doctor making his rounds, the milkman on his route, yea even the rural postman will be forced to stop and submit to indignities of persons who are or pretend to be prohibition officers. No doubt there are many violations of the prohibition laws but they must be curtailed by some other method than that of wholesale search without warrant. The disease may be bad but the cure is worse; it is unreasonable and hence violates the Fourth Amendment.

Even if this court will consider the fact shown for the first time at the trial that respondents once agreed to sell officer Cronenwett liquor and later came back and said they could not get it, there was no reasonable ground for an arrest or a search. There was no reason to believe that on this occasion the respondents were transporting liquor. No prior offense had been committed. At the best, there had existed a willingness to commit a liquor violation. It was not shown that respondents ever had the ability to complete the sale. The prior incomplete offense was of an entirely different nature than the one for which respondents were arrested. The first was a contemplated sale in Grand Rapids of liquor to be obtained

in that city. The latter was transportation of liquor toward Grand Rapids at a point thirty miles distant therefrom. The officers did not claim to know that respondents were regularly engaged in the business of selling liquor in Grand Rapids and there is no chance for any inference that the officers knew or had reason to suspect respondents of transporting liquor into Grand Rapids from distant points. In addition there is remoteness in point of time. The arrest was almost three months after the attempted purchase. Suppose that the officers had the time after seeing the respondents, to go before a magistrate to obtain a search warrant. Would the prior attempted purchase in September be "probable cause" for belief that respondents were committing an offense of an utterly different nature in December?

Let us take a hypothetical case. Suppose an officer overhears a wealthy club man trying unsuccessfully to purchase a quantity of liquor. Could that same officer secure a search warrant three months later for a search of that wealthy club man's home? Or could the officer after such a period of time stop the club man's automobile on the way to his golf course and conduct such a search as was made in the instant cause? To ask these questions is to answer them and the situation is identical in all material respects in the case at bar.

IV.

The Evidence Should Have Been Suppressed and the Liquor Returned.

We cannot believe that this court is contemplating overruling the principle announced in *Weeks v. United States.* It is true that some of the state courts have declined to follow that case, due chiefly to Mr. Wigmore's criticism of the rule. It is true that Mr. Wigmore is the greatest authority of all time upon the subject of evidence. However he does not weigh constitutional guaranties with his usual keenness. Believing generally that all relevant evidence should be admissible unless expressly forbidden, he announced the doctrine that illegal source of evidence is no ground for its rejection.

True the Fourth Amendment merely forbids officers to make unreasonable searches and does not expressly declare the evidence learned thereby inadmissible. However this court has wisely concluded that neither civil nor criminal proceedings against the officers will satisfactorily enforce the Constitution. Suits will rarely be brought by either the guilty or the innocent whose rights have been violated, because little or no damages can ordinarily be recovered. This court has wisely decided that the constitutional guaranty will be further protected by taking away all incentive to make illegal searches. The incentive is removed by declaring that the things seized must be returned and the evidence suppressed. This is the only method of putting life into the words of the Fourth Amendment.

This court's wisdom in so holding is well shown by recent experience. An amendment to the National Prohibition Law, Ch. 135, Section 6, passed Nov. 23, 1921, 42 Stat., 223, provides for punishment for an officer who makes an illegal search. Up to the present time there is

no reported case in which an officer has been punished under its provisions. Cases abound where unreasonable searches are made. The absence of reported cases punishing officers shows that this court's position is thoroughly justified.

It is not true that the great weight of authority in the state court is opposed to *Weeks v. United States.* On pages 29-30 of our brief, cases are cited showing that the *Weeks'* doctrine is followed in ten states, viz: Indiana, Iowa, Kentucky, Michigan, Mississippi, South Carolina, Washington, West Virginia, Wisconsin and Wyoming. To these can be added others which either expressly hold or clearly indicate that they favor the *Weeks'* doctrine.

Atz v. Andrews (Fla., 1922), 94 So., 329.
State v. Myers, 36 Ida., 396; 211 Pac., 440.
People v. Brocamp, 307 Ill., 448; 138 N. E., 728.
State v. Harris, Mo. App., ; 250 S. W., 925.
State v. Dist. Ct., 59 Mont., 600; 198 Pac., 362.
State v. One Hudson Automobile (1921), 190 N. Y. Supp., 481.

Several of the cases which oppose the doctrine of *Weeks v. United States,* are somewhat influenced by the fact that the possession of contraband goods is involved.

People v. Case, 220 Mich., 369; 190 N. W., 289.
Owens v. State (1923, Miss.), 98 So., 233.
City v. Walser, 45 S. D., 417; 187 N. W., 821, 823.
Rosanski v. State, 106 Oh. St., 442; 140 N. E., 370.
State v. Chuchola (Del., 1923), 120 Atl., 212.
State v. Simmons, 183 No. Car., 684; 110 S. E., 591.

In the government's original brief, pages four and five, this position is maintained. The government puts considerable reliance upon certain remarks of Mr. Justice Bradley in the case of *Boyd v. United States, 116 U. S., 616, 623.* But the court in that case did not say that any search and seizure of contraband was legal. The *Boyd cases*

involved the right to obtain documents by subpoena *duces tecum*. When read in the light of the case of *Gouled v. United States, 255 U. S., 298, 308-309,* it becomes apparent that even searches for contraband must be reasonable.

In the jurisdictions which recognize the doctrine of the *Weeks case,* however, the great weight of authority is that the rule applies to seizure of contraband as well as to papers and other property. See *State v. District Court, 59 Mont., 600; 198 Pac., 362, 367,* and the many cases in our former brief, particularly on pages 34-35. The *Weeks case* indeed is itself authority against any distinction, for contraband lottery-tickets were ordered returned. Moreover in the case of *Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266,* there was an order for the return of illicitly manufactured liquor which under the provision of Revised Statutes 3450-3457 was contraband.

The prevailing opinion in *People v. Case, 220 Mich., 369; 190 N. W., 289,* is ably answered by the dissenting opinion of Mr. Justice Wiest which is found on pages 36-37 of our original brief. That Michigan no longer adheres to the distinction between seizure of contraband and other property must be apparent from the following later Michigan cases in which evidence of contraband illegally seized is ordered suppressed.

People v. Musk., 221 Mich., 578; 192 N. W., 485.
People v. Hertz, 223 Mich., 170; 193 N. W., 781.
People v. Preuss, Mich., ; 195 N. W., 684.

The security of innocent persons and their papers, houses and effects is just as much threatened in case the officers are looking for contraband, as in case they are looking for evidential papers or lawful property. The rule in the *Weeks case* loses all its force if indiscriminate searches for contraband are encouraged.

V.

The Search Was Unlawful as to Both Defendants.

In the government's original brief, pages 19-20, it is contended that even if Carroll's rights were violated, Kiro's were not, for the reason that the petitions of both stated that the liquor and automobile belonged to Carroll only. This argument goes to the very root of the Fourth Amendment. The amendment guarantees the people security in their persons, houses, papers and effects. In other words it recognizes a right of privacy in these things which the government cannot infringe in an unreasonable manner. It is not necessary that things searched or seized should be owned by the accused in order that his rights be violated by an unreasonable search. It is sufficient if the accused's privacy in his person, or effects is violated. So far as the liquor is concerned there could be no property right even in Carroll for Section 25 of the National Prohibition Law expressly forbids. Both defendants were convicted on the theory that they were in possession of liquor. Both were engaged in the same enterprise. Kiro was driving the car (12). The privacy of his person was just as much invaded by the search as if the car had been owned by him. If a man is wearing a borrowed suit of clothes, his personal privacy is as much infringed by a rifling thereof as if he had owned the suit. We submit that within the meaning of the Fourth Amendment the search of an automobile in which one is driving is as much an infringement of his privacy of person as to search the clothing which he is wearing or the grip which he carries in his hand.

In addition it must be remembered that Carroll and Kiro were jointly indicted and tried. If the evidence were returned to Carroll as it should have been, it could not have been used to convict Kiro. The rights which belonged to Carroll naturally and of necessity inured to Kiro.

The cases cited on page 19 of the government's brief as supporting their contention are not in point for in those cases, no one was entitled to return of the property. *Wilson v. United States, 221 U. S., 361,* and *Drier v. United States, 221 U. S., 394,* were both cases in which corporate books were obtained by subpoena *duces tecum.* Of course the privilege against self-incrimination does not apply to corporations, so there was no person in existence who could be entitled to a return of the books. *Hayward v. United States (1920), 268 Fed., 795,* is a rather curious case in which papers of a voluntary association were unreasonably seized. Evidently upon the entity theory of such association, it was decided that the members of a voluntary association had no legal interest in the documents sufficient to demand a return thereof. Granting the premise of the theory adopted, the case is correctly decided but has no application to the instant cause.

CONCLUSION.

We believe that under the "timely application" rule of this court, evidence to aid the government on the question of reasonableness of the search, comes too late if offered for the first time at the trial. The government cannot possibly succeed in this case unless evidence at the trial is considered. But even if the government may be aided by the evidence at the trial, the facts applied to the existing law clearly shows that the search was unreasonable as to both defendants. The convictions must accordingly be reversed.

Respectfully submitted,

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